IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Criminal Appeal No.240-DB of 1998
Date of decision: 27.02. 2007

Daya Nand
(Through Jail)

-----Appellant.

Vs.

State of Haryana.

-----Respondent.

CORAM:- HON'BLE MR JUSTICE ADARSH KUMAR GOEL
HON'BLE MR JUSTICE H.S. BHALLA

Present: Mr. Dhruv Dayal, Advocate
Amicus Curiae for the appellant.

Mr. P.S. Sullar, D.A.G., Haryana
for the respondent.

Adarsh Kumar Goel, J.

This appeal has been preferred by the accused-appellant against his conviction under Section 376/302 IPC for rape of eight years old girl, followed by her murder. He stands sentenced to undergo RI for ten years and to pay a fine of Rs.500/- under Section 376 IPC and in default, to undergo further RI for six months. He also stands sentenced to life imprisonment under Section 302 IPC and to pay a fine of Rs.1,000/- and in default, to undergo further RI for one year. Both the sentences are to run concurrently.

PW-6 Surender made a statement before ASI Randhir Singh (PW-9), which led to registration of FIR on 16.06.1997 at 1 P.M. His statement is to the effect that he was living in Girdhari Colony Mujessar and was working in Chanda Enterprises. His elder brother was residing in Sanjay Colony. Daya Nand – accused was also residing in Girdhari Colony and working in Thermal Power House as a Helper and was neighbour of Surender. The accused used to come to the house of Surender. He also used to appreciate the daughter of Surender, aged 8 years named 'N'. On 15.06.1997 at 10 P.M., when Surender and his wife Bimla were sitting in the courtyard of the house along with 'N', Daya Nand came, talked to 'N' and took her with him. After some time, Virender (PW-7), brother of Surender came to the house of Surender and advised him that he should not send his daughter with the neighbours as the time was bad. The girl did not return home. Both the brothers Surender and Virender went out to search her. They asked Daya Nand, where 'N' was. He replied that he had left her at the same place from where he had taken her. They remained searching the girl throughout the night, but could not trace her. On the next day i.e. 16.06.1997 at 11 A.M., Dhakeli (PW-8) wife of Sukhan Singh who was living in the neighbourhood, told him that at 10.30 P.M. on the last night when she went for answering the call of nature, she had heard cries of a girl near the heap of rice husk. She had also seen Daya Nand running from the side of rice husk. Surender along with Virender searched for 'N' in the rice husk who found her deadbody in the heap of rice husk in naked condition with marks of injuries on her neck and froth was coming out of her mouth

and nostril. Daya Nand had committed the rape and murder and concealed the deadbody in the heap of rice husk.

After registering the FIR, Randhir Singh (PW-9) reached the spot, prepared inquest report (Exh.PF/1), sent the deadbody for post-mortem examination, prepared rough site plan, recorded the statements of the witnesses and arrested the accused. He took into possession swab and envelope produced by Constable Jit Singh and deposited the case property with the MHC. He interrogated the accused, recorded his disclosure-statement (Exh.PA) and recovered Salwar and Jamphar of the deceased on 18.06.1997. The accused was charged under Section 376/302/201 IPC.

The prosecution examined Dr. Shashi Bala (PW-3), who deposed that she conducted post-mortem on the deadbody of 'N' on 16.06.1997. The body had multiple contusions of 1 cm x 1 cm over the face. There was swelling over the chest, which was prominent. Rigour Mortis was present on the right lower limb. There was one contusion over the neck measuring 5 cms. x 2 cms. and frothy fluid was coming out from the nostril. Small intestines contained semi-digested food. Hymen margins were irregular and lacerated. Clotted blood was present in vagina, and surrounding area. Husk and mud was present in vaginal cavity. Vaginal opening two fingers loose. Cervix and uterus were normal.

The cause of death was asphyxia due to throttling and choking. All the injuries were ante mortem in nature and were sufficient to cause death in ordinary course of nature. Possibility of rape being committed, could not be ruled out, which was ante mortem.

In cross-examination, she denied that injury on the vagina could be by fall on hard surface. She further stated that semen was found on the swab.

PW-6 Surender supported the version mentioned in the FIR and also stated that he was a witness to the disclosure-statement and the recovery of clothes of the deceased. In cross-examination, nothing significant came out to contradict his testimony.

PW-7 Virender Rao, brother of Surender supported the version given by Surender and his version also remained unshaken in the cross-examination.

PW-8 Smt. Dhakeli, neighbour of Surender also supported the version of Surender. According to report (Exh.PG) of F.S.L., blood was detected on swab and human semen was also detected on the swabs and underwear. Blood could not be detected on the underwear. PW-2 ASI Bhagat Ram was a witness to the recording of the disclosure-statement and the recovery. PW-1 Sadhu Ram, SI partly investigated the case and submitted the challan.

After considering the evidence on record, the trial Court held the case of the prosecution to be fully proved, mainly on the basis of evidence of last seen furnished by PW-6 Surender, PW-7 Virender and PW-8 Dhakeli, medical evidence, recovery of clothes of the deceased at the instance of the accused as well as recovery of deadbody, corroborating the version given by Smt. Dhakeli (PW-8). Relevant findings of the trial Court can be summarized as under:-

(i) There was no unexplained delay in lodging the FIR. 'N' was found missing at 11.15 P.M. on 15/16.06.1995 and

FIR was registered at 1 P.M. on 16.06.1995 and the same reached the Illaqa Magistrate at 5 P.M. It was observed that the complainant did not have any suspicion against Daya Nand–accused initially and they were making efforts to search the girl. It was only on the next morning at 11 A.M. that Smt. Dhakeli provided a clue that she had heard noise of weeping of girl last night. This led them to recover the deadbody. Faced with such a tragic situation, the complainant was bound to take some time in going to the police station to lodge the FIR.

(ii) The evidence of PW-8 Smt. Dhakeli could not be doubted, by her not having disclosed noise of weeping of the child to her husband or to the complainant in the night itself, nor her conduct, of not going to check up why the child was weeping, created any suspicion. Her having gone out to answer the call of nature, could not be held to be unnatural.

(iii) Recovery of clothes of the deceased in pursuance to disclosure-statement, was a corroborative circumstance.

(iv) Discrepancy about place of arrest of the accused from the railway station or from his room, as differently stated by PW-6 Surender and PW-9 Randhir Singh, was not a material discrepancy.

(v) The presence of accused at the place of occurrence was probable.

(vi) Medical evidence also supported the occurrence.

(vii) In absence of clear evidence about the deadbody having been concealed in the heap of rice husk, charge under Section 201 was not made out.

We have heard learned counsel for the parties and perused the record.

Learned counsel for the appellant submitted that there was no direct evidence and circumstantial evidence was not clear and did not exclude possibility of innocence of the accused. It was submitted that the recovery was planted on the accused on account of suspicion. It was submitted that as per affidavit of HC Jai Kishan (Exh.PI), Randhir Singh, SHO had deposited one parcel of clothes in the Malkhana on 16.06.1997. The said parcel along with other items was sent for chemical examination on 19.06.1997 through Constable Mukesh Kumar. It was pointed out that since Randhir Singh having deposited the parcel of clothes on 16.06.1997 itself, there could be no question of recovery of clothes on 18.06.1997 on the basis of disclosure statement. It was next submitted that PW-9 Randhir Singh stating that he arrested the accused from his room in Mahabir Colony, whereas the complainant was the resident of Girdhari Colony and thus, the accused was not his neighbour. Reliance has been placed on following judgments:-

(i) ***Arokia Thomas*** ***v.*** ***State of Tamilnadu*** (2007) 1 SCC (Cri) 140, to the effect that identification of the accused by witness 2½ years after the occurrence, could not be accepted.

(ii) ***Kantilal @ K.L. Gordhandas Soni*** ***v.*** ***State of Gujarat*** (2002) 10 SCC 39, to the effect that in absence of reliability about the witness having means to identify the accused, evidence of identification could not be accepted.

(iii) ***Kansa Behera*** ***v.*** ***State of Orissa*** (1987) 3 SCC 480, to the effect that conviction cannot be based solely on the evidence of last seen together, particularly when another person is also seen with the deceased. Recovery of clothes without blood group being mentioned could not be connected with the deceased.

(iv) ***Sunny Kappor*** ***v.*** ***State (U.T. of Chandigarh)*** 2006 (3) RCR (Criminal) 48, to the effect that in case of circumstantial evidence, all links in the chain should clearly point the guilt of the accused alone and there should be proximity of the last seen circumstance with the time of death.

(v) ***Ramreddy Rajesh Khanna Reddy*** ***v.*** ***State of A.P.*** (2006) 3 SCC (Cri) 512, to the effect that all incriminatory circumstances must be proved by reliable evidence.

(vi) ***Subhash Chand*** ***v.*** ***State of Rajasthan*** (2002) 1 SCC 702, to the effect that on the facts of the case, evidence of last seen furnished by child of 4 years, was held to be unreliable and recovery of underwear stained with blood and semen, was not enough to show that the same belonged to the deceased, in absence of blood group.

(vii) ***Gambhir v. State of Maharashtra*** (1982) 2 SCC 351 laying down the principles for accepting of circumstantial evidence.

Learned counsel for the State supported the conviction and sentence of the appellant.

Question for consideration is whether circumstantial evidence, in the present case, is reliable and clearly points to the guilt of the accused and excludes all possibilities of the accused being innocent.

There is no doubt that burden of proving the guilt is on the prosecution and the accused gets the benefit of doubt. At the same time, it has to be kept in mind that a guilty person cannot be light heartedly acquitted. A pragmatic approach has to be adopted. In this regard, we are guided by the observation of the Hon'le Supreme Court in ***Shivaji Sahabrao Bobade v. State of Maharashtra,*** **AIR 1973 SC 2622,** the Hon'ble Supreme Court observed:-

> "6**.** ..... The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand special emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is

> a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned Author (Glanville Williams) has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted persons and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless."

Legal position is well settled that even in absence of direct evidence, conviction can be based on circumstantial evidence, if the incriminatory circumstances are clearly proved and are conclusive of the guilt of the accused. Reference may be made to the judgment of the Hon'ble Supreme Court in ***Hanumant Govind Nargundkar and another*** **v.** ***State of Madhya Pradesh*** AIR 1952 SC 343, wherein it was observed as under:-

> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any

> reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused….."

The above principles have been reiterated in subsequent judgments and it is not necessary to mention all the said judgments. Reference may only be made to the judgment of the Hon'ble Supreme Court in ***State of U.P*. v. *Hari Mohan*** AIR 2001 SC 142.

We find that the evidence of PW-6 Surender, PW-7 Virender and PW-8 Dhakeli about the deceased having gone with the accused, is categorical and reliable. There is no reason to doubt the version given by the prosecution witnesses, about the deceased having gone with the accused in the night and having not returned home. There is evidence that she was subjected to rape and done to death soon after the deceased went with the accused.

As regards the contention of learned counsel for the appellant that the accused was not a neighbour of the deceased, we find that in answer to question No.3 in statement under Section 313 Cr.P.C. to the effect that the accused used to visit the house of the complainant Surender and used to take away the deceased with him, the accused admitted that he was on visiting terms with the family of Surender. In view of this answer, discrepancy in the statement of PW-9 Randhir Singh about the house of the accused being in Mahabir Colony and not in Girdhari Colony is without any substance or significance.

Once the evidence of last seen is accepted, explanation of the accused has to be seen. His false plea can be an additional link in the chain of circumstances. He has denied having gone with the deceased though he admitted that he was on visiting terms with the family of Surender. This denial is clearly false.

In **Ganesh Lal v. *State of Rajasthan*** 2002(1) SCC 731, it was observed:-

> "19. .....The availability of the abovesaid pieces of incriminating circumstantial evidence and their having remained totally unexplained forge a complete chain of incriminating circumstantial evidence so as to fasten guilt upon the accused beyond any reasonable doubt. The silence of the accused supplies the missing link, if any, as held by this Court in the case of *State of Maharashtra* v. *Suresh....."*

In ***State of Maharashtra v. Suresh*** (2000) 1 SCC 471, it was observed:-

> "A female child of tender years was raped and murdered. Case against the accused rested on circumstantial evidence. The accused when arrested was found to have injuries on his person and blood and semen on the underclothes. There were several other incriminating circumstances pointing to the guilt of the accused and this one, mentioned just before, termed by this Court in its judgment as most formidable incriminating circumstance was put to the accused but he could not give any explanation whatsoever and instead chose to deny the existence thereof. This Court held that a false answer offered by the accused on his attention being drawn to such circumstance renders the circumstance

> capable of inculpating him. The Court went on to say that in a situation like this such a false answer can also be counted as providing a missing link for completing the chain of circumstantial evidence."

We further find that the evidence of last seen is corroborated by recovery of deadbody from the place where the accused had been seen soon after the deceased having been taken by him and soon after the time of rape and murder. In these circumstances, recovery of clothes of the deceased at the instance of the accused is also significant. We may refer to the disclosure-statement (Exh.PA). We do not find any merit in the contention on behalf of the appellant that the clothes had been recovered on 16.06.1997 itself. It is clear from Exh.PI as well as Exh.PJ affidavits of Mukesh Kumar that the parcels for chemical examination were taken away on 19.06.1997. PW-9 stated that disclosure-statement was made by the accused on 16.06.1997. Exh.PA, the disclosure-statement is also dated 16.06.1997. Recovery of clothes is on 18.06.1997 as per the recovery memo Exh.PB. Bhagat Ram, ASI (PW-2) also stated that recovery was effected on 18.06.1997. Thus, merely because in Exh.PI it is recorded that clothes were deposited by the SHO in the police station on 16.06.1997, it cannot be accepted that the recovery was not effected on 18.06.1997, but had already been effected on 16.06.1997, for which, there is enough evidence. This apart, even if this link is ignored, case of the prosecution is not affected.

No doubt, the blood group has not been mentioned in the report of the Chemical Examiner, but the same is not conclusive. The judgment of the Hon'ble Supreme Court in **Kansa Behera** (*supra)* relied upon by learned counsel for the appellant was explained in ***Khujji v. State of Madhya Pradesh*** AIR 1991 SC 1853. Relevant observations are as under:-

> **"10.** Mr. Lalit, however, argued that since the report of the serologist does not determine the blood group of the stains on the weapon and the pant of the appellant, the mere find of human blood on these two articles is of no consequence, whatsoever. In support of this contention he placed strong reliance on the decisions of this Court in *Kansa Behera* v. *State of Orissa*,(1987) 3 SCC 480 : (AIR 1987 SC 1507) and *Surinder Singh* v. *State of Punjab*, 1989 Suppl (2) SCC 21. In the first mentioned case the conviction was sought to be sustained on three circumstances, namely, (*i*) the appellant and the deceased were last seen together; (*ii*) a dhoti and a shirt recovered from the possession of the appellant were found to be stained with human blood; and (*iii*) the appellant had made an extra-judicial confession to two witnesses when arrested. There was no dispute in regard to the first circumstance and the third circumstance was held not satisfactorily proved. In this backdrop the question for consideration was whether the first and the second circumstances were sufficient to convict the appellant. This Court, therefore, observed that a few small blood stains could be of the appellant himself and in the absence of evidence regarding blood group it cannot conclusively connect the blood stains with the blood of the deceased. In these circumstances this Court refused to draw any

inference of guilt on the basis of the said circumstance since it was not conclusive evidence. This Court, however, did not go so far as to say that such a circumstance does not even provide a link in the chain of circumstances on which the prosecution can place reliance. In the second case also this Court did not consider the evidence regarding the find of human blood on the knife sufficient to convict the appellant in the absence of determination of blood group since the evidence of PW 2 was found to be uninspiring and there was no other circumstance to connect him with the crime. In this case we have the direct testimony of PW 1 Komal Chand, besides the testimony of PWs 3 and 4 which we have considered earlier. The find of human blood on the weapon and the pant of the appellant lends corroboration to the testimony of PW 1 Komal Chand when he states that he had seen the appellant inflicting a knife blow on the deceased. The appellant has not explained the presence of human blood on these two articles. We are, therefore, of the opinion that the aforesaid two decisions turned on the peculiar facts of each case and they do not lay down a general proposition that in the absence of determination of blood group the find of human blood on the weapon or garment of the accused is of no consequence. We, therefore, see no substance in this contention urged by Mr Lalit."

We may also refer to judgment of the Hon'ble Supreme Court in ***Amit v. State of Maharashtra*** **AIR 2003 SC 3131** on the question of significance of last seen evidence, which runs as under:-

"9. Learned counsel for the appellant has placed reliance on the decision of this Court by a Bench of which one of us (Justice Brijesh Kumar) was a member in *Mohibur*

> *Rahman* v. *State of Assam* U (2002) 6 SCC 715) for the proposition that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. In the decision relied upon it has been observed that there may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. The present is a case to which the observation as aforesaid and the principle laid squarely applies and the circumstances of the case cast a heavy responsibility on the appellant to explain and in absence thereof suffer the conviction. Those circumstances have already been noticed, in which case such an irresistible conclusion can be reached will depend on the facts of each case. Here it has been established that the death took place on 28th March between 3 and 4 p.m. It is just about that much time that the appellant and the deceased were last seen by PW 1 and PW 11. No explanation has been offered in the statement by the appellant recorded under Section 313 CrPC. His defence is of complete denial. In our view, the conviction for offence under Sections 302 and 376 has been rightly recorded by the Court of Session and affirmed by the High Court."

Thus, the circumstances of deceased having gone with the accused and her having been subjected to rape and murder, soon

thereafter, the accused having been seen by three different persons, the accused having admitted that he was on visiting terms with the family of the complainant, recovery of deadbody from the nearby place, accused's false plea that he did not take 'N' with him and recovery of clothes of the deceased at the instance of the accused form a complete chain, which excludes all possibilities of the accused being innocent.

For the above reasons, we are of the view that the case of the prosecution stands fully proved beyond reasonable doubt. Conviction and sentence of the appellant is liable to be upheld. There is no merit in the appeal.

The appeal is dismissed.

(ADARSH KUMAR GOEL)
JUDGE

February 27, 2007 **(H.S. BHALLA)**
ashwani **JUDGE**